BEFORE THE
SURFACE TRANSPORTATION BOARD

SUNBELT CHLOR ALKALI PARTNERSHIP Complainant v. NORFOLK SOUTHERN RAILWAY COMPANY and UNION PACIFIC RAILROAD COMPANY Defendants.	Docket No. NOR 42130

231639

NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO COMPLAINANT'S MOTION FOR LEAVE TO FILE SURREPLY

"A reply to a reply is not permitted." 49 C.F.R. § 1104.13(c). This simple, unambiguous rule has been a part of the agency's regulations since the Board was created, and indeed it was part of the Interstate Commerce Commission's rules of practice for many years before that.[1] But while this rule is well-established, it has been increasingly ignored by complainants in recent rate cases, several of whom have taken to filing replies to replies as a matter of routine. For example, over the past fifteen months complainants Total Petrochemicals USA, Inc., M&G Polymers USA LLC, and E.I. du Pont de Nemours & Co. filed no fewer than seven "replies to replies" in their pending rate cases.[2] Complainant SunBelt Chlor Alkali Partnership ("SunBelt") has now joined

[1] *See Interstate Commerce Commission: Revision and Redesignation of the Rules of Practice*, 47 Fed. Reg. 49534, 49556 (1982).

[2] *See Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket No. NOR 42121 (replies to replies filed Oct. 27, 2010, Nov. 29, 2010, and Dec. 28, 2010); *M&G Polymers USA LLC v. CSX Transp., Inc.*, STB Docket No. NOR 42123 (replies to replies filed Feb. 15, 2011 and Apr. 19, 2011); and *E.I. du Pont de Nemours & Co. v. Norfolk Southern Ry. Co.*, STB Docket No. NOR 42125 (replies to replies filed July 12, 2011 and Dec. 21, 2011).

this trend with its December 19 motion for leave to file a reply to Norfolk Southern Railway Company's ("NS's") reply to Union Pacific Railroad Company's ("UP's") "Motion for Partial Dismissal or, in the Alternative, Expedited Determination of Jurisdiction Over Challenged Rates."[3] SunBelt claims that the Board is "require[d]" to waive § 1104.13(c) and accept SunBelt's surreply because of "equitable considerations." SunBelt Motion for Surreply at 1. But those "equitable considerations" consist of little more than SunBelt's desire to revise the arguments it made in its initial Reply to UP's Motion. The Board should enforce its rules and disallow SunBelt's improper pleading.

Section 1104.13(c) reflects a Board policy to limit parties to "one round of pleadings each" and thereby "promote[] quicker Board action." *Beaufort R.R. Co. – Modified Rail Certificate*, STB Fin. Docket No. 34943, at 5 (July 21, 2009). The Board has explained that under 49 C.F.R. § 1104.13(c) "the pleading process ends with the reply, and replies to replies are not permitted."[4] Each party therefore has one opportunity to state its position on a motion: the movant states its position in the motion, and other parties state their reasons for opposing or supporting the motion in their replies. While the Board makes exceptions to § 1104.13(c) on a case-by-case basis, its practice is to only accept surreplies "[w]hen good cause is shown, or when

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[3] UP's September 26 "Motion for Partial Dismissal or, in the Alternative, Expedited Determination of Jurisdiction Over Challenged Rates" is referred to as "UP Motion"; SunBelt's December 6 Reply to that Motion is referred to as "SunBelt Reply"; NS's December 12 Reply to the UP Motion is referred to as "NS Reply"; SunBelt's December 19 motion for leave to file a reply to NS's reply is referred to as "SunBelt Motion for Surreply"; and the surreply SunBelt attached to its December 19 Motion is referred to as "SunBelt Surreply."

[4] *Waterloo Ry. Co. – Adverse Abandonment – Lines of Bangor & Aroostook R.R. Co. and Van Buren Bridge Co. in Aroostook Cty., ME*, STB Docket No. AB-124 (Sub-No. 2), at 3 (May 6, 2003) (*"Waterloo"*); *see also Pennsylvania R.R. Co. – Merger – New York Cent. R.R. Co.*, STB Fin. Docket No. 21989 (Sub-No. 4), at 7 (Jan. 10, 2011) (striking reply to reply); *Dairyland Power Coop. v. Union Pac. R.R. Co.*, STB Docket No. 42105, at 4 n.5 (July 29, 2008) (same).

Moreover, SunBelt's assertion that the "Board's standard procedural schedule for motions" did not "anticipate" multi-party proceedings is utter nonsense. The Board's rules explicitly contemplate proceedings with multiple parties,[9] and the Board regularly adjudicates complaints with more than one complainant or more than one defendant. *See, e.g., Arizona Elec. Power Coop. v. BNSF Ry. Co. & Union Pacific R.R. Co.*, STB Docket No. NOR 42113 (served Nov. 22, 2011). SunBelt cites no authority for the extraordinary proposition that 49 C.F.R. § 1104.13 is not applicable in cases where more than one party replies to a motion, and there is no language in the regulation that would justify that interpretation.

Perhaps recognizing that its argument lacks any basis in either the Board's regulations or its decisions, SunBelt asserts that "equitable considerations" require allowing its surreply. But it fails to provide any reason why equity requires that SunBelt be given a special right to respond to replies filed by other parties, other than the simple fact that SunBelt wants to respond to NS's Reply. Wishing "to have the last word in argument" does not demonstrate good cause. *Potomac Electric*, STB Docket No. NOR 41989, at 1 n.1 (June 27, 1997).[10]

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[9] See, for example, 49 C.F.R. § 1111.1(d) (setting forth joinder procedures for cases involving "[t]wo or more complainants"); *id.* § 1111.3 (discussing service in cases "[w]hen the complaint involves more than one defendant"); *id.* § 1111.4(c) (noting that answers must be served upon "any other defendants").

[10] Indeed, the logic of SunBelt's "equitable considerations" argument – that an opponent to a motion must be allowed to respond both to the motion and to any other replies to that motion – would substantially complicate motions practice in cases with more than one litigant. For example, SunBelt has filed a "Motion for Clarification" to which NS and UP replied on Friday, January 6. Under SunBelt's logic, "equity" requires that NS be allowed to reply to UP's reply (and that UP be allowed to reply to NS's reply). And any other motion filed by a party in this case or any other case with more than two litigants similarly would trigger an additional round of replies to replies. Section 1104.13(c) was designed to prevent such endless rounds of serial pleadings by giving each party one opportunity to state its position on a motion. If the past is prelude, SunBelt may well seek to file replies to the replies filed Friday by NS and UP – something that the Board simply should not countenance.

Second, SunBelt claims that it should be allowed to file a Surreply because "NS has changed the facts to which the SunBelt Reply was addressed" by amending its tariff to make clear that SunBelt can separately challenge NS's rate in the event that UP is dismissed. SunBelt Motion for Surreply at 2. But NS's action did not "change[] the facts to which the SunBelt Reply was addressed"; on the contrary, NS simply responded to SunBelt's claimed concern that it would not be allowed to separately challenge NS's rate if UP was dismissed for lack of market dominance. Indeed, the "facts to which the SunBelt Reply was addressed" were set forth in UP's Motion and consisted of the overwhelming and compelling evidence that UP's portion of the challenged movement is subject to effective intramodal competition from BNSF Railway Company. SunBelt's Reply offered no substantive response to that evidence. Instead, SunBelt argued that evidence of UP-BNSF competition was irrelevant because SunBelt was legally required to challenge the entire UP-NS through movement. *See* SunBelt Reply at 4. SunBelt claimed that the Board needed to permit it to challenge the through movement as a whole because otherwise "NS undoubtedly would file its own motion to dismiss" a separate challenge to the NS rate and thereby would "deny SunBelt any regulatory remedy." *Id.* at 4-5 (emphasis omitted).

In response to the accusation that NS "undoubtedly" was planning to seek dismissal of a challenge to the NS Rule 11 rate if UP's Motion was granted, NS pledged in its Reply that it would not object to a separate challenge to its tariff should UP be dismissed and amended its tariff to make clear that it could (and must) be separately challenged as a local rate. *See* NS Reply at 3.[11] Showing the fallacy of SunBelt's speculation that NS was secretly plotting to "file its own motion to dismiss" if UP were dismissed did not "change the facts" – it simply

[11] NS's Reply addressed some of the arguments in SunBelt's Reply because SunBelt chose to file its Reply to UP's Motion a week before it was due.

demonstrated that SunBelt's baseless supposition was untrue. The fact that NS's Reply proved that SunBelt's Reply was based on a false premise does not entitle SunBelt to file a Surreply to advance different arguments.

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The Reply to SunBelt's Motion for Clarification that NS filed on January 6 responds to the substantive arguments in SunBelt's Surreply and demonstrates that SunBelt's attempts to ignore the actual rate structure set by NS and UP and instead posit a SAC analysis for a fictional joint rate structure is incompatible with the carrier rate initiative mandated by the Interstate Commerce Act. But the Board should not consider SunBelt's Surreply arguments at all, because SunBelt has failed to demonstrate the good cause that is necessary for the Board to accept its improper pleading. The Board should make clear that it will not tolerate the routine disregard for § 1104.13(c) exhibited by recent rate case complainants and will not fail to enforce its rules simply because a complainant demands "to have the last word." *FMC Wyoming*, STB Docket No. NOR 42022, at 1 n.2; *Potomac Electric*, STB Docket No. NOR 41989, at 1 n.1.

CONCLUSION

For the foregoing reasons, SunBelt's Motion for Leave to File a Reply to NS's Reply to UP's Motion for Partial Dismissal or, in the Alternative, Expedited Determination of Jurisdiction Over Challenged Rates should be denied.

Respectfully submitted,

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Dated: January 9, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January 2012, I caused a copy of Norfolk Southern Railway Company's foregoing Reply to Complainant's Motion for Leave to File Surreply to be served on the following parties by first class mail, postage prepaid, or more expeditious method of delivery:

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